

**Motion for Procedures to Protect
Privacy Interests of Jurors and
Integrity of Jury Selection Process**

U.S. District Court, Eastern District, Sacramento
Sept. 26, 1997

UNITED STATES OF AMERICA
Plaintiff,

V.
THEODORE JOHN KACZYNSKI,
Defendant.

CR-S-96-259 GEB

Date: September 26, 1997
Time: 1:30 p.m
Hon. Garland E. Burrell, Jr.

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INTRODUCTION

Pursuant to this Court's amended order, dated September 5, 1997, the prospective jurors in this case are to appear in person to fill out juror questionnaires prior to the commencement of jury selection on November 12, 1997. See Jury Selection Process appended to Amended Order. Initial hardship determinations will be made at the time that prospective jurors appear to complete the juror questionnaires. (*Id.*) Prospective jurors have been summoned to appear in person to complete the questionnaires in order to ensure the integrity of the voir dire process. This on-site, in-person process is designed to assure that the prospective jurors will be able to answer the questions themselves without any outside influences. To further ensure the privacy of the prospective jurors and the integrity of the jury selection process, the following procedures should be followed:

1. The blank juror questionnaire (including all drafts that the court finds should be filed) should be filed under seal and maintained under seal until the case is concluded;
2. Members of the press and the public should not be present at the time that the prospective jurors complete the juror questionnaires;
3. Members of the press should be precluded from photographing or interviewing prospective jurors who appear to complete written juror questionnaires;
4. The identity of the jurors who serve, as well as of the other prospective jurors, and their completed questionnaires should be sealed until the case is concluded.
5. The initial hardship determinations should be conducted in camera in the presence of counsel and on the record. The transcripts of these hardship proceedings may be made available after the Court's determination whether to discharge the prospective jurors. The prospective jurors' identities and any sensitive information should be redacted from the transcripts.

I.

THE BLANK JUROR QUESTIONNAIRES MUST BE SEALED UNTIL THE CONCLUSION OF THIS CASE

The blank juror questionnaire should be filed under seal and maintained under seal until the case is concluded. The prospective jurors have been summoned to complete juror questionnaires in person so as to maintain the integrity of the jury selection process. Completing the questionnaires in person will preclude the possibility that

prospective jurors will be influenced by others when answering the questions. Releasing the blank questionnaire to the press prior to the completion of the jury selection process will taint the process. If prospective jurors are able to learn from media coverage what questions are asked prior to their appearing in person to complete the questionnaire, the efforts to maintain the integrity of the jury selection process will be defeated.

Similarly, the blank questionnaire cannot be released prior to oral questioning as part of voir dire in this case because speculation by the press as to the meaning or purpose of the questions contained in the questionnaire will taint prospective jurors' answers to questions on voir dire. For these reasons, the blank questionnaire was filed under seal and maintained under seal in *United States V. McVeigh*, CR 95-110-A (W.D. Okla. Sept. 27, 1995) (Alley, J.) , 1995 WL 583383, (ordering the filing and maintaining of the draft questionnaires under seal) ; *United States V. Mcveigh*, CR 95-110-A (D. Colo. March 6, 1996) , 1996 WL 117627, (Matsch, C.J.) (ordering that the juror questionnaires remain under seal).

II.

MEMBERS OF THE PRESS AND PUBLIC SHOULD NOT BE PRESENT WHEN THE PROSPECTIVE JURORS FILL OUT THE QUESTIONNAIRES

Assembling prospective jurors who have reported to jury duty in the jury room and instructing them as to the procedures that they will follow with regard to their prospective jury service is not a proceeding that is open to the public and the press. Likewise, assembling prospective jurors to complete a written questionnaire as a preliminary step to participating in voir dire is not an event to which the public and press should have access. A finding that the assembling of prospective jurors to complete written questionnaires is not a proceeding that should be open to the press and public comports with the Supreme Court's analysis regarding the public nature of criminal trials.

In *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984), the Supreme Court, after reviewing the history of the criminal trial under the common law, held

that the traditional guarantees of openness of a criminal trial extend to voir dire examination in court. (464 U.S. at 505-10.) Nothing in the Court's opinion supports a view that the press and public traditionally have had access to the jury assembly room or that the press or public, therefore, would have the right to view prospective jurors silently completing questionnaires.

This view is supported by the purpose underlying open voir dire proceedings, which is to guarantee that "offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." (*Id.* at 509.) That purpose is not furthered by public or press access to the prospective jurors while they are completing the questionnaires because no jury selection process is occurring at that time.

The purpose of having prospective jurors assemble to complete the questionnaires is to guarantee the integrity of the questionnaire process and to protect the privacy interests of the prospective jurors. In the context of juror questionnaires, it is the authority of the Court that assures the integrity of the process, not the presence of the public or the press. A presumption that the integrity of the jury process can only be maintained by the presence of the public and press would lead to the ineluctable conclusions that: (1) the press and public should be given access to the jury room to ensure that jurors do not discuss the case among themselves prior to jury deliberations, and (2) the press and public should be given access to the jury room during jury deliberations to ensure that all of the evidence is considered and the trial court's instructions are followed. Clearly, the public and press have no right of access to the jury room or to jury deliberations and for like reason should have no access to prospective jurors while they complete written questionnaires.

Moreover, denial of public and press access to the proceedings ensures that the prospective jurors' privacy rights are respected. If the prospective jurors received the juror questionnaire with their summons and completed it in the privacy of their homes, the press and public would have no right of access to the jurors while they completed the questionnaires. (*See United States V. Mcveigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997) (questionnaires were mailed with the jury summons).) Denial of access to the jurors while assembled to complete the questionnaire provides the same privacy safeguards.

III.

**THIS COURT SHOULD ENTER AN ORDER PROHIBITING THE
PRESS FROM INTERVIEWING OR PHOTOGRAPHING
PROSPECTIVE JURORS**

As discussed above, the assembling of the prospective jurors in this case is the functional equivalent of assembling the prospective jurors in the jury room. The press would not have access to photograph or interview jurors assembled in the jury room and should not have access to them in this case. Moreover, the Court clearly has the authority to limit the ability of the press to photograph or of sketch artists to draw jurors during the course of a trial. (*Cf. Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304, 139f (1983) (discussing the trial court's order, directing that "[n]o person shall draw sketches, photograph, televise or videotape any juror or jurors during their service in these proceedings") .) Even though forty-seven state courts permit cameras in the courtroom, every state recognizes the importance of the jurors privacy interests by limiting or prohibiting the photographing of the jury during the proceedings. (See Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras In State Courts: A Historical Perspective*, 78 *Judicature* 128, 135 (1994) ("televised coverage of voir dire and of jurors is usually restricted or prohibited").) Accordingly, the Court should exercise its authority in this instance. In the alternative, the Court should direct the United States Marshal's Service to provide a means of access to the proceedings so that the jurors have the choice of avoiding the press.

Through either of the means outlined above, the Court can show the jury that it is aware of the difficulties that are inherent in possible jury selection in this case and is making every effort to protect the prospective jurors' right to privacy.

IV.

**THE IDENTITY OF THE JURORS SELECTED TO SERVE ON THIS
JURY AND THEIR JUROR QUESTIONNAIRES SHOULD REMAIN
SEALED**

In light of the extensive publicity that this case has received and is anticipated to receive in the future, this Court has indicated that it is inclined to impanel a partially anonymous jury, withholding the "names, places of employment, residences, and

employment addresses of jurors and their spouses from the public”. Amended Order, at 2. In addition, the Court, in accordance with the dictates of *Press-Enterprise*, intends to follow a procedure pursuant to which “venirepersons who are reluctant to answer sensitive questions publicly ... [can] ... respond [to] the same in camera.” (Amended Order, at 5-6 (citation omitted).) This Court opined that such precautions are necessary because, “even though juror names may remain confidential during trial, the interest justifying anonymity during trial ‘becomes attenuated after the jury brings in its verdict and is discharged.’” (Amended Order, at 5 (quoting *Capital Cities Media*, 463 U.S. 1303, 1306 (1983).) Accordingly, courts have held that “[n]o explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires.” Amended Order, at 5 (quoting *Copley Press Inc V. Superior Court*, 228 Cal.App.3d 77, 87, 278 Cal. Rptr. 443, 450, *cert. denied*, 502 U.S. 909 (1991)).

Capital Cities Media involved a local homicide case that attracted “a great deal of public interest” in Pennsylvania. After jury selection but before sequestration, the trial court, sua sponte without any hearing or record, entered an order prohibiting the publication of the names or addresses of the jurors. (463 U.S. at 1303-05.) The jurors, however, had been selected in open court with the press and public present and their names had been disclosed. (*Id.* at 1305.) The record, therefore, failed to provide sufficient justification for a “categorical, permanent prohibition against publishing information already in the public record”. (*Id.* at 1306.)

A case such as the one at bar presents the kind of situation in which permanent sealing is appropriate. The media attention already received, and which will undoubtedly continue in this case, is extraordinary. Our system of jury service contemplates not only that jurors will be able to serve as jurors without interference by the public and press but also contemplates that the “jurors will inconspicuously fade back into the community once their tenure is completed.” (*Application of Daily News*, 787 F. Supp. 319, 323 (E.D.N.Y. 1992) (quoting *United States V. Gotti*, 777 F. Supp. 224, 226 (E.D.N.Y. 1991). See *United States V. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (denying press request for release of jurors names, addresses and other personal information in highly publicized case) ; *cf. United States v. Beckham*, 789 F.2d 401, 406-415 (6th Cir. 1986) (denying the media the right to copy audio and videotapes, tape transcripts, and exhibits in a highly publicized political case) .)

**THE JUROR QUESTIONNAIRES OF THOSE PROSPECTIVE
JURORS WHO DO NOT SERVE ON THE JURY IN THIS CASE
SHOULD BE SEALED**

The prospective jurors who do not ultimately serve on the jury should remain sealed as the press and public would never have any right of access to the information contained in the questionnaires unless, and until, the prospective jurors actually participate in the voir dire examination. See *Copley Press*, 228 Cal.App.3d at 87, 278 Cal. Rptr. at 450 (relying on *Leshner Communications, Inc. v. Superior Court*, 224 Cal.App.3d 774, 779, 274 Cal. Rptr. 154, 156 (1990) ("Press-Enterprise does not require that disclosure be made of questionnaires submitted by venirepersons never called to the jury box for voir dire").

In holding that the questionnaires of venirepersons not chosen to serve on the jury should not be disclosed, the *Copley* court adopted the reasoning of the *Leshner* court:

"[W]e assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The *Press Enterprise* court rested its decision that voir dire must be open to the public on the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venirepersons who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned. We see no legitimate public interest in disclosure of these questionnaires.

(228 Cal. App.3d at 87 n.8, 278 Cal. Rptr. at 450 n.8.) In adopting the holding of the *Leshner* court, the *Copley* court reasoned that the prospective jurors' privacy interests outweighed any countervailing rationale for disclosure. (*Id.*)

Furthermore, nondisclosure comports with the procedure normally followed in the jury selection process. Prospective jurors fill out a juror questionnaire that accompanies the jury summons. This information, however, does not become a matter of public record until the prospective jurors are asked the same or similar questions in open court and give their answers on the record. Where records, such as these, are not entered into

evidence or filed in court, they are not matters of public record to which the public and press have a constitutional or common law right of access. (*See In the Matter of Newsday, Inc.*, 71 N.Y.2d 146, 518 N.E. 2d 930 (N.Y. App. 1987), *cert denied*, 486 U.S. 1056 (1988); *cf. Beckham*, 789 F.2d at 406-415 (upholding on constitutional and common law grounds the district court's denial of the media's requests to copy audio and videotapes, transcripts of tapes and trial exhibits); *United States V. Board of Education*, 747 F.2d 111, 114 (2d Cir. 1984) (upholding the district court's denial of media's request to tape record the proceedings in a civil trial) .)

VI.

HARDSHIP DETERMINATIONS SHOULD BE CONDUCTED IN CAMERA

According to the procedures for jury selection, hardship determinations will be made prior to the completion of juror questionnaires. Thus, those prospective jurors who believe that they are unable to serve as jurors in this case will present their reasons for hardship to the Court. Only if such claims of hardship are rejected will the prospective juror then complete a juror questionnaire. Conducting the hardship determinations in camera will encourage candor in the hardship process and in answering the questionnaires, if required.

If the press and public are present during the initial hardship determinations, the prospective juror may self-censor so as to avoid embarrassment in the public eye. This lack of candor could lead to the denial of a hardship request and a subsequent lack of candor in the juror questionnaire so as to avoid further exposure to the media and public. To ensure the integrity of the jury questionnaires and the hardship determinations, and the privacy rights of the prospective jurors, the hardship determinations should be conducted in camera with counsel present and on the record. The transcripts should be sealed temporarily and may be released, with identifying and other sensitive information redacted from them, following the completion of the juror questionnaires.

CONCLUSION

It is requested that this Court take the above requested steps to ensure the integrity of the questionnaire process and that the privacy of the prospective jurors, including those who are ultimately selected to serve, is protected.

DATED: September 15, 1997

Respectfully submitted,

QUIN DENVIR
(signature)

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(signature)

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